

[Senate Bill 140](#) (Leno)

Date: Introduced

Program: Cigarette & Tobacco Products Licensing Act

Sponsors: American Heart Association, American Lung Association, and American Cancer Society

Business and Professions Code 22958

Effective January 1, 2016

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This analysis only addresses the provisions that impact the Board of Equalization (BOE).

Summary: Among other things, this bill:

- Adds a “tobacco product” definition to the Stop Tobacco Access to Kids Enforcement (STAKE) Act¹ that includes an electronic nicotine delivery device, such as an electronic cigarette (e-cigarette), and
- Requires the BOE to suspend or revoke a retailer’s Cigarette and Tobacco Products Licensing Act of 2003² (Licensing Act) license and impose a civil penalty for furnishing a “tobacco product” to a minor.

Purpose: To protect the public against exposure to e-cigarettes.

Fiscal Impact Summary: Does not impact state cigarette and tobacco product tax revenues.

Existing Law:

Cigarette and Tobacco Products Tax Law³ (CTPTL). Revenue and Taxation Code (RTC) Section 30451 specifically provides that the BOE shall enforce the provisions of the CTPTL and may prescribe, adopt, and enforce rules and regulations relating to its administration and enforcement.

Existing law imposes an 87-cent per package of 20 (43 ½ mills per cigarette) cigarette tax. The CTPTL requires tax payment through the use of stamps or meter impressions that a distributor affixes on each cigarette package prior to the distribution.

RTC Section 30123 imposes a tax upon the distribution of tobacco products, based on the wholesale cost of these products at a tax rate that is equivalent to the combined rate of tax imposed on cigarettes. The BOE annually determines the tobacco products tax based on the March 1 cigarette wholesale cost. The fiscal year 2014-15 surcharge rate is 28.95%. Distributors pay the tobacco products tax through the use of a tax return that reports the wholesale cost of the tobacco products distributed and calculates the tax due.

RTC Sections 30121 and 30131.1 define “tobacco products” to include, but not be limited to, all forms of cigars, smoking tobacco, chewing tobacco, snuff, and any other articles or products made of, or containing at least 50%, tobacco, but does not include cigarettes.

Licensing Act. The Licensing Act requires the BOE to administer a statewide program to license cigarette and tobacco products manufacturers, importers, distributors, wholesalers, and retailers. Business and Professions Code (BPC) Section 22972 requires a retailer to have a license to sell cigarettes and tobacco products in this state. Section 22972 further requires a retailer to obtain a separate license for each retail location that sells cigarettes and tobacco products.

Section 22974.8 requires the BOE to suspend or revoke a retailer’s license upon notification by the California Department of Public Health (CDPH) for certain STAKE Act violations.

¹ Division 8.5 (commencing with Section 22950) of the BPC.

² Division 8.6 (commencing with Section 22970) of the BPC.

³ Part 13 (commencing with Section 30001) of Division 2 of the RTC.

This staff analysis is provided to address various administrative, cost, revenue and policy issues; it is not to be construed to reflect or suggest the BOE’s formal position.

STAKE Act. The STAKE Act established a statewide enforcement program to take action against businesses that illegally sell tobacco to minors. In general, the STAKE Act requires the CDPH to:

- Implement an enforcement program to reduce the availability of tobacco products to minors and conduct sting operations using 15 and 16 year old minors granted immunity;
- Establish requirements for tobacco product retailers to conspicuously post a notice stating that selling tobacco products to a person under 18 years of age is illegal and subject to penalties;
- Assess civil penalties ranging from \$200 to \$6,000 against the store owner for violations; and
- Comply with the Synar Amendment (Section 1926 of Title XIX of the federal Public Health Service Act) and prepare an annual report regarding enforcement activities and their effectiveness for the federal government, Legislature, and Governor.

Furthermore, the STAKE Act:

- Requires all persons engaging in the retail sale of tobacco products to check the identification of tobacco purchasers if the purchaser reasonably appears to be under 18 years of age.
- Prohibits any person, firm, or corporation from selling, giving, or in any way furnishing to another person who is under the age of 18 years any tobacco, cigarette, cigarette papers, any other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco, products prepared from tobacco, or any controlled substance.
- Prohibits the selling, offering for sale, or distributing tobacco products from a cigarette or tobacco products vending machine unless such vending machines or appliances are located at least 15 feet away from the entrance of a premises issued an on-sale public premises license, as defined.
- Prohibits advertising of any tobacco product on any outdoor billboard, as specified.
- Prohibits a person engaged in the retail sale of tobacco products from selling, offering for sale, or displaying for sale any tobacco product or tobacco paraphernalia by self-service display, except as permitted. Retailers of blunt wraps cannot place or maintain, or cause to be placed or maintained, any blunt wraps advertising display within two feet of candy, snack, or nonalcoholic beverage displayed inside any store or business or that is less than four feet above the floor.
- Prohibits the distributing or selling of tobacco products directly or indirectly to any person under the age of 18 years through the United State Postal Service or through any other public or private postal or package delivery service, as described.

BPC Section 22958 authorizes an enforcing agency to assess civil penalties against any person, firm, or corporation that sells, gives, or in any way furnishes to another person who is under the age of 18 years, any tobacco, cigarette, cigarette papers, any other instrument or paraphernalia that is designed for the smoking or ingestion of tobacco, products prepared from tobacco, or any controlled substance. Upon CDPH notification, Section 22958 requires the BOE to suspend or revoke a retailer's Licensing Act license upon a civil penalty assessment for third, fourth, or fifth sales to minors violation, in accordance with the following schedule:

- A 45-day suspension of the license for a third violation at the same location within a five-year period.
- A 90-day suspension of a license for a fourth violation at the same location within a five-year period.
- Revocation of the license for a fifth violation at the same location within a five-year period.

Section 22958 also requires the BOE to assess an additional \$250 civil penalty. The BOE deposits the penalty amounts collected into Cigarette and Tobacco Products Compliance Fund (Compliance Fund).

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Proposed Law: Among other things, this bill amends BPC Section 22950.5 within the STAKE Act to define “tobacco product” to mean any of the following:

- A product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to, cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, or snuff.
- An electronic device that delivers nicotine or other substances to the person inhaling from the device, including, but not limited to, an electronic cigarette, cigar, pipe, or hookah.
- Any component, part, or accessory of a tobacco product, whether or not sold separately.

“Tobacco product” does not include a product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product or for other therapeutic purposes where the product is marketed and sold solely for such an approved purpose.

This bill amends BPC Section 22958 to allow an enforcing agency to assess civil penalties against any person, firm, or corporation that sells, gives, or in any way furnishes to another person under 18 years of age any “tobacco product.” As a result, Section 22958 requires the CDPH to notify the BOE upon a civil penalty assessment for a third, fourth, or fifth violation that includes any “tobacco product,” as well as any cigarette, tobacco, or specified related product. Existing law requires the BOE to impose a \$250 civil penalty and to take action in accordance with the specified schedule, which includes the suspension or revocation of a retailer’s Licensing Act license.

This bill becomes effective January 1, 2016.

In General: In 1992, Congress passed Section 1926 of Title XIX of the federal Public Health Service Act, commonly called the “Synar Amendment,” which requires each state to:

- Have in effect a law prohibiting any manufacturer, retailer or distributor of tobacco products from selling or distributing such products to any individual under the age of 18.
- Enforce such laws in a manner that can reasonably be expected to reduce the extent to which tobacco products are available to individuals under the age of 18.
- Conduct annual random, unannounced inspections to ensure compliance with the law. These inspections are to be conducted in such a way as to provide a valid sample of outlets accessible to youth.
- Develop a strategy and timeframe for achieving an inspection failure rate of less than 20% of outlets accessible to youth.

Failure to meet the terms and conditions of the Synar Amendment could result in reductions (up to 40%) in the amount of Substance Abuse Prevention and Treatment (SAPT) block grant funds allocated to California for alcohol and other drug prevention and treatment programs.

To comply with the Synar Amendment, the Legislature passed Senate Bill 1927 (Stats. 1994, Ch. 1009) which established the STAKE Act. The STAKE Act created a new statewide enforcement program to take regulating action against businesses that illegally sell tobacco products to minors. Enforcement authority and implementation responsibility was delegated to the Department of Health Services.⁴

E-Cigarettes. The California Attorney General Office’s Tobacco Highlights includes e-cigarette information:

“Electronic cigarettes are battery powered devices designed to look and feel like regular cigarettes, but they emit water vapor rather than smoke. The cartridges contain liquid nicotine

⁴ The CDPH, Food and Drug Branch, now enforces the STAKE Act program.

and various flavors. Known as e-cigarettes or e-cigs, the products have become popular in the past couple of years. The U.S. Food and Drug Administration consider e-cigarettes “drugs or devices” and claims the products must be approved by the FDA before they can be sold in the U.S. To date, no e-cigarettes have been approved by the FDA. Preliminary tests by the FDA found that e-cigarettes contain many impurities and some contain dangerous chemicals. FDA’s jurisdiction to regulate e-cigarettes is in litigation, however. E-cigarettes are not governed by the Master Settlement Agreement or by many of California’s tobacco laws.

The California Attorney General’s Office is concerned that e-cigarettes are being sold in the state without appropriate quality control and with many false or misleading claims about their safety or effectiveness. Many are also in violation of California’s Proposition 65 which requires health warnings about dangerous chemicals.

California passed a statute prohibiting the sale of electronic cigarettes to minors. (Health & Safety Code §119405). The office is investigating a number of electronic cigarette companies selling e-cigarette products on the Internet to ensure compliance with the statute as well as other consumer protection provisions. Many companies are coming into compliance voluntarily.”

Background: In 2003, Assembly Bill 71 (J. Horton, Ch. 890) enacted the Licensing Act, which established a statewide licensure program administered by the BOE to help stem the tide of untaxed distributions and illegal sales of cigarettes and tobacco products. Currently, the BOE licenses 35,000 retailers and 900 distributors and wholesalers to engage in the sale of cigarettes and tobacco products in California.

In 2012, Assembly Bill 1301 (Hill, Ch. 335) amended the STAKE and Licensing Acts to require the BOE to suspend or revoke a retailer license for certain cigarette and tobacco products sales to minors violations.

Commentary:

1. **Tobacco products taxation.** This bill creates a “tobacco product” definition within the STAKE Act, which includes e-cigarettes. This bill does not amend the “tobacco products” definition within the CTPTL or the Licensing Act. Accordingly, this bill does not impose the cigarette and tobacco products tax upon a tobacco product as defined pursuant to this bill’s BPC Section 22950.5 (e-cigarettes). The cigarette and tobacco products tax continues to apply to “tobacco products” as defined in RTC Sections 30121 and 30131.1, which reads:

“Tobacco products” includes, but is not limited to, all forms of cigars, smoking tobacco, chewing tobacco, snuff, and any other articles or products made of, or containing at least 50 percent, tobacco, but does not include cigarettes.

2. **Suggested technical amendment.** This bill adds a “tobacco product” definition to the STAKE Act for sales to minors enforcement. The added “tobacco product” definition includes e-cigarettes, a product not associated with tobacco products for the CTPTL and Licensing Act purposes. Consequently, the STAKE Act requires an enforcement agency to assess a civil penalty for furnishing e-cigarettes to a minor with the retailer’s Licensing Act license subject to suspension or revocation for a third, fourth, or fifth violation. However, not all e-cigarette retailers hold a Licensing Act license since they may not sell cigarettes or tobacco products as defined pursuant to the CTPTL.

BOE staff suggests the following amendment to clarify that the BPC Section 22958 civil penalty and license suspension or revocation applies only to persons required to obtain a Licensing Act retailer license:

22958. (b)(1) In addition to the civil penalties described in subdivision (a), upon the assessment of a civil penalty for the third, fourth, or fifth violation, the department, within 60 days of the date of service of the final administrative adjudication on the parties or payment of the civil penalty for an uncontested violation, shall notify the State Board of

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Equalization of the violation. The State Board of Equalization shall then, for any person required to be licensed pursuant to Chapter 2 (commencing with Section 22972) of Division 8.6, assess a civil penalty of two hundred fifty dollars (\$250) and suspend or revoke a license issued pursuant to Chapter 2 (commencing with Section 22972) of Division 8.6 in accordance with the following schedule:

Administrative Costs: The bill results in additional BOE administrative costs to register e-cigarette retailers for third, fourth, and fifth STAKE Act violations in order to impose and collect the \$250 civil penalty required pursuant to BPC 22958. Other costs include publication and form revisions; collection tasks; public inquiry responses; and related computer programming. A detailed cost estimate is pending.

The bill would result in absorbable costs if the bill is amended as suggested in Comment 2.

Revenue Impact: This measure does not significantly impact state cigarette and tobacco product tax revenues.